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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SOLOMON PERCY TEMPLE, Defendant and Appellant.	C056599 (Super. Ct. No. 04F00780)

Based on crimes occurring on January 24 and March 23, 2004, a jury convicted defendant Solomon Percy Temple of discharging a firearm with gross negligence (count one), carrying a concealable firearm (count two), carrying a firearm in a public place (count three), transportation of marijuana (count four), resisting arrest (count five), evading a pursuing officer while in a motor vehicle (count six), assault with a firearm (count seven), discharging a firearm at an occupied building (count eight), and making criminal threats (count nine). As to counts

seven and nine, the jury found true enhancements for personal use of a firearm, criminal street gang activity, and being on bail when the offenses were committed, and as to count eight, the jury found true enhancements for criminal street gang activity and being on bail when the offenses were committed.

Sentenced to state prison for 18 years four months to life, defendant appeals, contending (1) the evidence was insufficient to support the gang enhancement, (2) the trial court abused its discretion in denying his request not to impose a 15-years-to-life term for the gang enhancement, and (3) the court committed prejudicial error in ordering defendant shackled during trial. We reject each claim.

FACTS[1]

On March 23, 2004, defendant and York Swygert, both validated Meadowview Bloods gang members, drove into a service station operated by Tirath Singh and parked between two gas pumps, where they remained for about 30 minutes, blocking other customers from using the pumps. According to Singh, he twice asked defendant to get his gas and move his vehicle, but defendant did not do so. Defendant eventually went inside the station's store, shook Singh's hand, and gave him $1.65 for gas.

William Babbitt, a correctional officer at San Quentin State Prison, came into the store and heard defendant and Singh

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[1] Defendant does not raise any issues regarding the offenses that occurred on January 24, 2004, which involved his firing a handgun he carried in his vehicle and then attempting to evade the police by means of a high-speed chase.

arguing. Defendant was speaking loudly and leaned over the counter in what appeared to be an attempt to shake Singh's hand, but Singh backed up. Although Babbitt claimed he could not remember whether Singh shook defendant's hand, he admitted testifying at the preliminary hearing that Singh had refused to shake defendant's hand and defendant had asked Singh, "Why are you disrespecting me?" In an attempt to get defendant to leave, Swygert said, "Come on, Blood. Let's go," and the two eventually left. Instead of driving off, though, defendant obtained a shotgun, walked toward the store, and fired the gun at the window behind which Singh was located. Defendant then entered the store and said to Singh that he was going to "burn this bitch down."

Sacramento Police Officers Paul Curtis and Daniel Chipp were driving by the service station when they saw defendant walking toward the store carrying a shotgun. Chipp got out of the patrol car and started toward defendant. As defendant reached the store's doorway, Chipp yelled at him to drop the gun and for everyone to get down. Defendant looked at Chipp, then raised the weapon and fired into the window of the store. Defendant ran to a black Nissan and jumped in, and Chipp ran up to the car, yelling at the driver to stop. Defendant was lying face down on the back seat and "smacking the driver's seat, like go, go, go.". The car drove away.

Swygert, who had not fled, was questioned as he stood beside an Oldsmobile. On the Oldsmobile's floorboard was a

shotgun with a spent round in the chamber. Defendant was found hiding in the attic of his home.

Adlert Robinson, an expert in gangs, testified that defendant and Swygert were members of a street gang known as the Meadowview Bloods. Through the use of hypothetical questions, Robinson opined that defendant's shooting at the window where Singh was located was gang related because Singh had disrespected defendant in front of Swygert and other persons in the store, and disrespect was an act that required defendant to respond in order not to show weakness.

DISCUSSION

I

The jury found that the offense charged in count eight (discharging a firearm at an occupied building) was committed for the benefit of a criminal street gang pursuant to Penal Code section 186.22, subdivision (b)(1),[2] which mandated an additional term of 15 years to life. Defendant contends the evidence is insufficient to support the criminal street gang finding. We disagree.

The California Supreme Court has stated: "[T]o subject a defendant to the penal consequences of [section 186.22, subdivision (b)], the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' (§ 186, subd. (b)(1)[].) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') . . . ." (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617 (*Gardeley*).)

The substantial evidence standard applies to review of challenges to the sufficiency of the evidence to support a section 186.22 finding. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.) Namely, "'[w]e do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury's verdict. [Citation.]' [Citation.] . . . Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate '"that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citation.]' [Citation.]" (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 610 (*Alexander L.*).)

Defendant asserts there is no substantial evidence to support findings that (A) the Meadowview Bloods constitutes a criminal street gang; (B) he committed the shooting for the benefit of, or in association with, the Meadowview Bloods; and that (C) in committing the shooting he had the specific intent to promote, further, or assist in criminal conduct by the Meadowview Bloods.

A. The Meadowview Bloods is a Criminal Street Gang

The existence of a criminal street gang requires proof of three elements: (1) an ongoing association involving three or more participants, having a common name or identifying sign or symbol; (2) that one of the group's primary activities is the commission of one or more designated crimes; and (3) that the group's members, either individually or as a group, have engaged in a pattern of criminal gang activity. (*Alexander L.*, *supra*, 149 Cal.App.4th at pp. 610-611.) Defendant challenges only the latter two elements.

Primary Activities

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*).) *Sengpadychith* went on to note that "[s]ufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently*

and repeatedly have committed criminal activity listed in the gang statute [and that a]lso sufficient might be expert testimony . . . ." (*Id.* p. 324.)

As an example of expert testimony sufficient to establish the primary activities element, *Sengpadychith* summarized the expert testimony given in *Gardeley*: "[In *Gardeley*], a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.] The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies." (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324, quoting *Gardeley*, *supra*, 14 Cal.4th at p. 620.)

Here, Robinson, whose expertise in criminal street gangs defendant does not challenge, testified that he was familiar with the Meadowview Bloods; he had spoken with "no less than about 50" of their members in custodial, investigatory, and casual settings regarding their criminal gang activity, lifestyle, and objectives; he had read police reports regarding Meadowview Bloods; and he had personally arrested Meadowview Bloods gang members. Based upon the foregoing, Robinson concluded that the gang's primary activities were sales of narcotics, attempted and completed homicides, robberies, and

burglaries, all of which are listed in section 186.22, subdivision (e).

Robinson also testified that he was familiar with Christopher Williams and Dante Granville, each of whom was a validated Meadowview Bloods gang member at the time of the following incidents. In 2003 Williams robbed a woman on her way to make a bank deposit and was subsequently convicted of the robbery. In 2000 Granville fired several shots at a rival gang member and was convicted of attempted murder.

Defendant argues that Robinson's testimony regarding the reports he read and arrests he made was "vague," and that the Williams and Granville incidents were not shown to be other than "the occasional commission of two specified crimes by two particular Meadowview Bloods members." The argument is not persuasive because even without considering the Williams and Granville incidents, Robinson's testimony regarding the reports he had read and arrests he had made, as set forth above, was at least as detailed as that given by the expert in *Gardeley*, which was found legally sufficient by the court in *Sengpadychith*. Consequently, the primary activities element was adequately established.

Pattern of Criminal Gang Activity

The "pattern of criminal gang activity" element may be proven by evidence that two or more enumerated offenses were committed by a gang member on separate occasions, or by two or more persons. (§ 186.22, subd. (e); *Gardeley*, *supra*, 14 Cal.4th at pp. 620-621.)

Defendant claims the evidence is insufficient to prove this element because the Williams and Granville incidents were not shown to be other than isolated crimes. The argument is not well taken. In proving a "pattern of criminal gang activity," it is immaterial whether the separate offenses committed by Williams and Granville, both of which are included within section 186.22, subdivision (e) and were committed while they were Meadowview Bloods members, were isolated or not. Commission of the offenses need not be gang related. (See *Gardeley*, *supra*, 14 Cal.4th at p. 621 [nothing in section 186.22, subdivision (e) requires the "'two or more' predicate offenses to have been committed 'for the benefit of, at the direction of, or in association with' the gang . . . ."]; see also *Alexander L.*, *supra*, 149 Cal.App.4th at p. 611 ["The crimes necessary to establish a pattern within the meaning of section 186.22, subdivision (f) . . . need not be gang related"].) Hence, evidence of the Williams and Granville incidents was sufficient.

B. Offense Committed for the Benefit of and with Specific Intent to Promote the Gang

To impose the penal consequences of section 186.22, subdivision (b)(4)(B), the prosecution must prove that the offense was committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186, subd. (b)(4).) Proof of this element may be established by the opinion of a gang expert based upon hypotheticals embracing the evidence in the case, even where the opinion

includes an ultimate issue. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946-947 & fn. 3; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.)

Here, Robinson was presented a hypothetical embracing the evidence in the case, specifically: suppose that two Meadowview Bloods gang members drive into a service station in the neighborhood and park in front of a pump for 15 to 20 minutes without moving the vehicle; that the gang members are asked by the store clerk to move their car; that the gang members enter the store, where three or four customers are present, and an argument ensues with the store clerk over payment for the gas; that the store clerk threatens to call the police; that one of the gang members reaches over the counter and tries to shake the store clerk's hand, but the store clerk refuses to do so; that the gang member responds, "Why are you disrespecting me?"; and that the gang members leave the store and the member who complained about being disrespected obtains a gun and fires at the store window, behind which is the clerk.

When asked whether the shooting was done in association with the Meadowview Bloods, Robinson opined that it was. Robinson based his opinion on the shooter's need to respond to having been disrespected in front of his gang companion and other witnesses while on his home turf. The gang mentality was such that to avoid appearing weak, and to bolster his and the gang's reputation as persons not to be messed with, the shooter had to do something, which in the hypothetical was to shoot in the direction of the store clerk.

Citing *People v. Martinez* (2004) 116 Cal.App.4th 753, *People v. Albarran* (2007) 149 Cal.App.4th 214, and *In re Frank S.* (2006) 141 Cal.App.4th 1192, defendant argues as follows: "[E]xcept for [Robinson's] opinion that the gas station incident could benefit the Meadowview Bloods gang, there was no specific evidence connecting the offenses with gang activity. The offenses were not committed on rival or disputed gang territory, the victims were not rival gang members, the offenses were not committed in such a way as to be broadcast to rival gang members or the community at large, no gang related statements were made nor signs thrown, there were no gang related brags or boasts during or after the commission of the offenses, there was no evidence that people in the community understood the offenses to be gang related, no gang graffiti was left at or near the scene, and there was no financial or monetary gain from the incident which inured to any alleged gang member."

The cited cases are not on point because none of them involve circumstances where, as here, a gang member's offense was in response to his having been "disrespected" in front of another gang member as well as neighborhood witnesses. Neither gang rivalry nor financial gain were at issue here.

Relying on *People v. Ferraez* (2003) 112 Cal.App.4th 925 (*Ferraez*), defendant also argues that Robinson's testimony "standing alone" is insufficient to support the finding that the shooting was gang related. *Ferraez*, too, is distinguishable.

Ferraez involved the relatively passive offense of sale of drugs by a gang member in another gang's territory, with the permission of the latter, and a gang expert's opinion that the sale was gang related because gangs sell drugs to further their criminal conduct. (*Ferraez*, *supra*, 112 Cal.App.4th at p. 928.) *Ferraez* did not involve, as here, an immediate violent response to a gang member's being disrespected in front of another gang member and other witnesses in the gang's neighborhood. Nor does *Ferraez* set forth the detailed hypothetical facts of the type used by Robinson in arriving at his opinion that the shooting was gang related. Thus, *Ferraez* is not on point.

"The elements of the gang enhancement may be proven by expert testimony." (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332.) Therefore, the sole question here is whether from Robinson's testimony, which embraced all the essential elements of whether the shooting was gang related, coupled with the evidence provided by other witnesses regarding the shooting, the jury could reasonably find that the shooting was gang related. The answer, for reasons set forth below, is affirmative.

Robinson testified that the Meadowview Bloods is a criminal street gang and that defendant and Swygert were members. Robinson also testified that when a gang member is disrespected he is pressured to respond because failure to do so is viewed as a weakness and his stature in the gang is severely diminished. That pressure is increased when the disrespect occurs in front of another gang member or other witnesses on the gang member's own turf. Robinson was given a hypothetical that embraced

evidence provided by independent witnesses surrounding the instant shooting, namely, that two gang members enter a service station store in the gang members' neighborhood; that an argument ensues between one of the gang members and the store clerk regarding payment for gas; that the clerk refuses the arguing gang member's offer to shake hands in front of the other gang member and other witnesses; and that the arguing gang member accuses the clerk of disrespecting him, the two gang members leave the store, and the arguing gang member immediately obtains a shotgun and returns toward the store, where he fires one shot at the window behind which is the store clerk. Robinson opined that in such circumstances the shooting was gang related. Finding nothing illogical or inherently unreasonable in Robinson's reasoning, we similarly conclude that the jury could reasonably infer the instant mindless shooting was gang related.

Defendant also contends that "Robinson's opinion testimony constituted improper profile evidence which does not amount to substantial evidence supporting the gang enhancement." First, to the extent defendant challenges the evidence as "improper," i.e., inadmissible, defendant's failure to object to its admission on this ground forfeits the issue for appeal. (Evid. Code, § 353; *People v. Rogers* (1978) 21 Cal.3d 542, 548 ["questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal"].) As to the evidence's insufficiency, we have already

determined that Robinson's opinion testimony, coupled with the evidence provided by other witnesses to the shooting, does constitute substantial evidence.

Finally, defendant contends that his right to due process was violated because "[t]he true findings on the gang enhancements" were based on insufficient evidence. Since we have found the evidence was sufficient, the contention is rejected.

II

Defendant contends the trial court abused its discretion when it denied his request, made pursuant to section 186.22, subdivision (g), not to impose the term of 15 years to life under section 186.22, subdivision (b)(4)(B). We reject this claim.

The indeterminate term provided by section 186.22, subdivision (b)(4) is an alternative penalty provision, not an enhancement. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, fn. 6 (*Robert L.*).) Section 186.22, subdivision (g) permits the court in an "unusual case where the interests of justice would best be served" to "strike the additional punishment for the enhancements" provided in section 186.22, subdivision (b). Consequently, section 186.22, subdivision (g) does not apply to subdivision (b)(4) of section 186.22.

Citing *Sengpadychith*, *supra*, 26 Cal.4th 316, defendant attempts to evade the foregoing conclusion, arguing that because "[t]he California Supreme Court has referred to subdivision (b)(4)(B) as an 'enhancement' which increases the

base term punishment," we should construe subdivision (g) of section 186.22 also as being applicable to subdivision (b)(4)(B). *Sengpadychith* does not aid defendant.

The passage in *Sengpadychith* referred to and relied upon by defendant is the following: "Does the criminal street gang sentence enhancement increase the penalties for the underlying crimes? Yes, for two categories of felony offenses listed in the enhancement provision. [¶] For certain specified felonies punishable by a determinate term of imprisonment, the criminal street gang enhancement *increases* the punishment for the offense to an indeterminate term of imprisonment *for life*. (§ 186.22, subd. (b)(4).)" (*Sengpadychith*, *supra*, 26 Cal.4th at p. 327.)

Robert L. disposes of defendant's argument. "In *People v. Sengpadychith . . .* we referred to current section 186.22, subdivision (b)(4) as a 'criminal street gang enhancement [that] *increases* the punishment for the offense.' But the issue in that case was not whether this provision was a sentence enhancement rather than an alternate penalty provision, and '[l]anguage used in any opinion is of course to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not therein considered.' [Citation.]" (*Robert L.*, *supra*, 30 Cal.4th at p. 900, fn. 6.)

III

Defendant contends the trial court committed reversible error when, without a showing of manifest need, it permitted him

to be placed in "restraints" during the court proceedings. We disagree.

The rule regarding restraints is clear: "'"[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a *manifest need for such restraints.* [Citation.]" [Citations.] Such a "'[m]anifest need' arises only upon a showing of unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .'" [Citation.] . . . "'The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.'" [Citation.] A court's decision to place a defendant in physical restraints will not be overturned on appeal unless there is a "showing of a manifest abuse of discretion." [Citations.]' [Citation.]" (*People v. Fisher* (2006) 136 Cal.App.4th 76, 80.)

Prior to trial, the court observed that the sheriff's office had concerns about defendant's not being physically restrained because of his "history in the jail." Deputy Travis, the court bailiff, testified that defendant had three major and two minor write-ups while in custody.

In April 2006 defendant was disobedient toward a deputy and made obscene gestures and verbal threats. After getting into a fight with another inmate, defendant argued with deputies and

refused to follow their directions. When asked to move his belongings from his cell into a segregation unit, defendant became angry, said he wasn't moving, and returned to his cell, where he placed his belongings in a box and threw them into the recreation area.

In August 2005 defendant was in a fight with an inmate. When deputies ordered him to lie on the ground, instead of complying, he ran back to his cell.

In July 2005 defendant was in a fight with other inmates, and when officers tried to break it up, defendant took a fighting stance and attempted to strike one of the deputies. He continued to resist when they tried to place him under control.

At the conclusion of Deputy Travis's testimony, the court affirmed that defendant had been "pretty darn polite" and observed that he had been "a perfect gentleman" the several times he had been in court. Nevertheless, the court stated, "I am, however, going to err on the side of caution" and order that the "restraint around your waist to the chair remain in effect."

Defendant argues that "[h]ere, there was no 'manifest need' as [defendant's] in-court behavior was, by the court's own admission, polite and conforming." The argument is not convincing. Notwithstanding that defendant may have been a model citizen while in court, that did not guarantee he would have remained that way through the trial, particularly so if things were not to his liking. His record while in jail established his capacity for violence and unwillingness to

follow directions of the jail deputies. Given his dangerous history, there was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.